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(Consolidated)

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1995

Denver Area Educational Communications Consortium, Inc., et al.,
Petitioners,
v.
Federal Communications Commission and United States of America,
Respondents,
and
Alliance For Community Media, et al.,
Petitioners,
v.
Federal Communications Commission and United States of America,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

Morality in Media, Inc. ("Amicus"), as Amicus Curiae, files this brief in support of the Respondents in this case, which is before this honorable Court on the merits under the provisions of Rule 37(3)(a). The written consents of the petitioners and respondents have been requested and all parties have consented thereto in writing. Copies of these consents are being filed concurrently with this brief.

Morality in Media has a special interest in this case because it was the organization which suggested to Congress the need to restore to cable operators editorial control over "indecent" programming on leased and public access cable TV channels.[1] Amicus' proposal sprang from its experience in combatting indecent programming on the leased access channel in New York City, and from responding to complaints from other parts of the nation with similar problems on public and leased access channels.

Morality in Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states, and its Board of Directors and Advisory Board are composed of prominent businessmen, clergy and civic leaders.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along

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[1] *Cf.*, 138 Cong. Rec. S647-648 (daily ed. Jan. 30, 1992) (letter of Robert Peters of Morality in Media).

with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 note 4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 58, notes 7 and 8 (1973).

More recently Morality in Media participated as Amicus in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct. 1282 (1992); and in the case below, *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995).

Morality in Media is filing a brief in this matter in support of respondents because it believes that the problem of obscenity or indecency on cable TV access channels is growing and that the decision in this case will have a lasting effect on government's ability to effectively address the evil of cable obscenity and indecency. It is the belief of MIM, based on the briefs below, that its brief contains relevant matter that may not be brought to the attention of the Court by the parties, to wit that indecency on cable TV access channels is "nuisance speech" which is unprotected by the First Amendment and which can be prohibited to protect adults in the privacy of their homes and children.

SUMMARY OF ARGUMENT

In 1984, Congress required larger cable systems to provide leased access channels and authorized local franchise authorities to require public access channels on all

systems. In addition, Congress prohibited cable operators from exercising "editorial control" over these channels, but to prevent these channels from becoming conduits for porn and other indecent material, Congress also empowered franchising authorities to prohibit or restrict indecency.

Unfortunately, Congress' decision to prevent cable operators from exercising "editorial control" resulted in many access channels becoming conduits for porn and other indecent programming. In Subsections 10(a) & (c) of the Cable TV Consumer Protection and Competition Act of 1992, Congress removed the barriers preventing operators from exercising "editorial control" over indecency. In doing so, it did not engage in prohibited "state action."

Recognizing that some operators may carry indecent or obscene material, Subsection 10(b) requires that indecent programs be placed on restricted access channels, and Subsection (d) removes operator immunity for carriage of obscene material. The purpose of these Subsections was to protect, as much as Congress thought possible, children and the American people against indecent or obscene programming--not to coerce or "significantly encourage" cable companies to "ban" indecency.

In 1984, Congress also preempted states and local authorities from imposing "requirements" regarding the "content of cable services." What was then preempted, cannot again be preempted by the Act at issue in this case.

This Court should not rush to conclude that privately owned cable TV channels have been designated "public forums," particularly when these "forums" intrude into the home and are easily accessible to children.

Indecency on cable TV leased access channels,

which intrudes uninvitedly into the home, assaulting unwilling adults and providing easy access to children, is a form of "nuisance speech" which, like broadcast indecency, is unprotected by the First Amendment and can be prohibited. Section 10(b) is, therefore, constitutional.

Applying the indecency standard to cable TV access channels will not reduce adults to viewing only that which is fit for children, since adults in the privacy of their homes also have a right to not be assaulted by indecent programming, and the "indecency" standard is determined not by what is "harmful to minors" but rather by what is "patently offensive," when applying community standards.

Finally, the "indecency" standard is not vague or overbroad, as this Court held in *FCC v. Pacifica*. To be indecent, programming must be "patently offensive," when applying community standards. "Time of day" and "serious value" are also "variables" to we weighed in determining whether programming is "indecent."

ARGUMENT

I

SECTION 10 DOES NOT CONVERT A CABLE OPERATOR'S DECISION TO PROHIBIT INDECENT PROGRAMMING ON PRIVATELY OWNED CHANNELS INTO 'STATE ACTION'

In January 1992, Senator Helms introduced an amendment to the Cable TV Consumer Protection and Competition Act of 1992 ("Cable Act of 1992"), which removed the legal barrier to the exercise by cable operators of editorial control over "indecent" material on cable TV *leased* access channels.[2] In addition, the Helms'

[2] Section 10(a) of Cable Act of 1992.

amendment required cable operators to put indecent programming, they choose to carry, on a blocked channel[3]. Other amendments were introduced (1) to allow operators to exercise editorial control over indecency on *public* access channels[4] and (2) to do away with operator immunity from liability for carrying obscenity on all access channels.[5]

Petitioners in case No. 95-227 (i.e., Alliance for Community Media, Alliance for Communications Democracy and People for the American Way, hereinafter "Petitioners AAP") argue that this statutory scheme (i.e., Section 10 of the Cable Act of 1992) on its face "disadvantages certain disfavored speech based solely on the speech's content."[6]

The concern in *Turner Broadcasting System v. FCC*,[7] however, was "laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views." In FCC v. Pacifica Foundation,[8] this Court stated that indecency is at the "periphery of First Amendment concern" and that restrictions on indecent speech have their "primary effect on the form, rather than the content, of serious communication."

Clearly, Congress can prohibit indecent speech in

[3] Section 10(b) of the Cable Act of 1992.

[4] Section 10(c) of the Cable Act of 1992.

[5] Section 10(d) of the Cable Act of 1992.

[6] Pet. AAP Br. at 18.

[7] 62 LW 4647, 4652 (U.S. 1994)

[8] 438 U.S. 726, at 743, including note 18 (1978).

some contexts,[9] and Amicus contends that it is also clear from the legislative history and provisions of the Cable Communications Policy Act of 1984 (hereinafter "Cable Act of 1984"), that when Congress prohibited cable operators from exercising "editorial control" over access channels, it also empowered franchising authorities to prohibit or restrict cable services which are indecent.

Subsection 612(h)[10] of the Cable Act of 1984, pertaining to "leased access" channels, specifies that:

> (h) Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is...indecent or is otherwise unprotected by the Constitution. [Emphasis added]

Of Subsection 612(h), the Report of the House Committee on Energy and Commerce[11] stated:

> "Subsection 612(h) addresses an issue of particular concern to the Committee--the potential availability of obscene or otherwise Constitutionally unprotected programming over cable systems."

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[9] See, e.g., *FCC v. Pacifia Foundation*, 438 U.S. 726, 732 (1978) (affirming FCC order that the "Filthy words" monologue at issue "as broadcast was indecent and prohibited by 18 U.S.C. 1464"); *Hustler Magazine v. Falwell*, 56 LW 4180, 4182 (1988) (citing *Pacifica* for the proposition that regulation of indecent expression is an "exception to the general First Amendment principles").

[10] 47 U.S.C. 532(h).

[11] H.R. Rep., No. 98-934, 98th Cong., 2d Sess., p. 55 (1984) (hereinafter "House Report").

The similar phrase "otherwise unprotected by the Constitution" is also found in Subsection 624(d)(1)[12] of the Cable Act of 1984, which applies to programming on both public and leased access channels, and which permits franchising authorities to specify, in a franchise that:

> "[C]ertain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or otherwise unprotected by the Constitution."

Amicus would contend that Subsection 624(d)(1) was intended to allow franchising authorities to prohibit or restrict "indecent" cable TV programming--*to the extent this Court permits it*. As noted in the House Report:

> This provision would also permit changing constitutional interpretations to be incorporated into the standard set forth in 624(d)(1), should those judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable...The Committee recognizes with respect to cable the need to provide for the restriction, within constitutionally permissible grounds, on the availability of programming, which might not be obscene, but is nonetheless indecent, if children are going to be adequately protected from exposure to such material.[13] [Emphasis supplied]

Neither children nor society, however, were

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[12] 47 U.S.C. 544(d)(1).

[13] House Report, at 69-70; see also 130 Cong. Rec. S14288-14289 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater that phrase "other similar laws" encompassed indecency.)

"adequately protected" by the Cable Act of 1984 from obscene or indecent programming on access channels, and Congress should not now be prevented from providing much needed protection, because in 1984 it mistakenly believed that it had adequately addressed the problem.[14]

Furthermore, the First Amendment was intended to protect against incursions *by the Government*, and not by private persons, and a cable operator's right to not transmit "indecent" speech should not depend on whether or not the state or Federal government has, in the past, forced it to provide access for such speech.[15]

Petitioners AAP also argue that since some states and franchising authorities had denied cable operators

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[14] *Cf.*, Statement of Senator Wirth in support of Subsection 10(c) of the Cable Act of 1992. 138 Cong. Rec. S650 (daily ed. Jan. 30, 1992). Senator Wirth, who authored the public access channel provisions of the Cable Act of 1984, stated that the purpose of these channels was to "make sure" that cable operators could not "shut out all kinds of public programming." He went on to say, however:

> But, clearly, that has now been abused. Any of us who have been to New York City recently and looked on the television set..will see this is true. Time-Warner has no choice; I mean, they have to provide this kind of access for what essentially has nothing to do with any kind of public interest whatsoever. It is the most prurient, in fact, in many ways, grossly illegal access one could imagine...So I hope that all of us will support the Fowler amendment and give a very clear signal to the cable companies that, in fact, they can police their own systems, which they cannot do now. This is a service not only to the public, but, also, to the cable companies themselves.

[15] While phone companies in some states can choose to deny services to "dial-a-porn" companies [see *Carlin Com., Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352 (11th Cir. 1986)], companies in other states are not permitted to do so -- and may never be able to do so if Petitioners' "state action" views prevail.

editorial control over indecent programming *before* Congress passed the 1984 Cable Communications Policy Act, Congress did not "restore" to cable operators their editorial control because the operators "never had the discretion in the first place."[16]

Amicus would argue that there is a difference between a person who does not have a constitutional right to begin with (e.g., to shout "fire"' in a crowded theater), and *one who does have a constitutional right but who is prevented by government from exercising it*. If a state enacts a law prohibiting cable operators from exercising "editorial control" or, pursuant to a franchise agreement, an operator agrees to not exercise editorial control, the cable operators do not lose their constitutional rights--or never have them "in the first place." Just as government prevented the exercise of these rights, it can remove the barriers to their exercise and, in effect, "restore" them.

Petitioners AAP also argue that Section 10 constitutes "state action" because it preempts all state laws and franchising agreements.[17] Subsection 624(f)(1)[18] of the Cable Act of 1984, however, already preempted States and local authorities from imposing "requirements regarding the...content of cable services, except as expressly provided."[19] Nowhere does the Cable Act of 1984 expressly provide that states or franchising

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[16] Pet. AAP Br. at 23.

[17] Pet. AAP Br. at 24-27.

[18] 47 U.S.C. 544(f)(1).

[19] *Cf., Community Television v. Wilkinson*, 611 F.Supp 1099, 1102-1103 (D.C. Utah 1985).

authorities can require cable operators to carry "indecent" programming. On the contrary, it is clear from the legislative history and from provisions within the Cable Act of 1984 that Congress did not intend or desire that access channels become protected havens for indecency.

Nor do Sections 636 and 637[20] of the Cable Act of 1984 "expressly" provide that cable operators can be required to carry indecent programming. Given the policy expressed in Subsections 612(h) and 624(d)(1)(2) *against* carriage of indecency, Amicus would argue that these Sections preempt any state law or franchise provision which would require carriage of indecent programming on access channels. Clearly, if states and franchising authorities were preempted by the Cable Act of 1984, they cannot again be preempted by the Cable Act of 1992.

Petitioners AAP also argue that state action is present because Section 10 "significantly encourages" the "underlying private conduct."[21] For Congress, however, to do all that it believed it could do constitutionally to address the problem of obscene or indecent programming on public and leased access channels, does not add up to a plan or scheme to "ban indecent speech on access channels"[22] or to "compel censorship."[23]

Government often imposes burdens on the exercise of a right. For example, the Federal "Dial-A-Porn" statute

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[20] 47 U.S.C. 556 and 557.

[21] Pet. AAP Br. at 27.

[22] Pet. AAP Br. at 28.

[23] *Id.* at 29.

requires telephone companies that provide billing services to providers of "indecent" messages to block access to such messages from the telephones of subscribers who have not in writing requested access.[24] Communities also restrict the location and operation of "adult uses." Compliance can be costly, but a person's decision to not open an "adult use" is not thereby converted into "state action." Nor are such private decisions converted into "state action" by obscenity laws or by the statements of some legislators, who would prefer that "sexually oriented businesses" not open at all in their communities.[25]

In enacting Section 10 of the Cable Act of 1992, Congress removed a barrier it had imposed on the right of cable operators to exercise editorial control over indecent material on access channels. It did so, not to encourage cable operators to ban indecent programming, but because it had every reason to believe that most, if not all, cable operators were carrying such material against their will.[26]

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[24] 47 U.S.C. 223(c)(1).

[25] See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 929 (1986); *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968)("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive...What motivates once legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it....").

[26] *Cf.*, Statement of Sen. Wirth, quoted above at p. 8. See also, **"Bill to Limit 'Offensive' Cable TV Programs Introduced in Albany,"** *N.Y. Times*, 5/28/81 (article notes that sponsor of bill to give cable companies "greater control" over public access channels to prevent "'proliferation of pornography'" was joined at a news conference by representatives of "one of two Manhattan cable franchises."); and **"Cable ads 'within law,'"** *N.Y. Post*, 2/12/87 (article quotes Manhattan Cable TV general counsel as saying that lack of editorial control over

Congress also required cable operators, who choose to carry indecency on leased access channels, to put it on a blocked channel. It did so, not to encourage cable operators to ban indecent programming, but rather to protect children if the cable operators choose to carry it.[27] Finally, Congress stripped cable operators of immunity from liability for carrying obscenity on leased/public access channels. It did so, not to encourage operators to ban indecency, but to discourage carriage of obscenity.[28]

Petitioners AAP also argue that "public access" channels are a "public forum."[29] Amicus would urge this Court to not rush to conclude that either local franchising authorities or Congress have transformed channel space on a privately owned cable system into a "public forum," particularly when the "forum" intrudes into the privacy of the home and is uniquely accessible to children.[30]

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sexually oriented ads on leased channels was a "situation Manhattan Cable is not particularly happy to be in").

[27] 138 Cong. Rec. S646-647 (daily ed. Jan. 30, 1992) (statement of Senator Helms); *Id.* at S648-649 (statement of Sen. Coats).

[28] See, e.g., *Playboy Enterprises v. Public Service Com'n of P.R.*, 698 F.Supp. 401 (D. Puerto Rico 1988); **"DA, Prompted by Koch, Probes Late Night Sex Telecasts,"** *N.Y.C. Tribune*, 12/8/89 (article describes letter from NYC Mayor Koch asking district attorney to investigate "pornographic cablecasts" on Manhattan Cable TV's "leased access" channel that "may be obscene under state or federal law.").

[29] Pet. AAP Br. at 32-33.

[30] Furthermore, even in a "public forum," obscenity, harmful to minors and public indecency laws apply, and as this Court has held, "indecent" speech, which may be constitutionally protected outside the home, can be regulated when it intrudes into the privacy of the home and is accessible to children. *Pacifica*, at 438 U.S. 749, n.27.

Amicus would also argue that it is one thing to require persons to dedicate private property, which they do not use for communicative purposes (e.g., telephone poles or sidewalks in front of mall stores), for "public use," and another thing to require persons to "dedicate" valuable TV channels for "public indecency." Required access channels have often deprived viewers of quality programming.[31]

II
CABLE TV INDECENCY WHICH INTRUDES INTO THE HOME, ASSAULTING UNWILLING ADULTS AND PROVIDING EASY ACCESS TO CHILDREN, IS A FORM OF 'NUISANCE SPEECH' WHICH CONGRESS CAN PROHIBIT

A. 'Nuisance Speech' Is a Category of Speech Outside First Amendment Protection.

This Court has often stated that there are narrowly limited classes of speech which are not protected by the First Amendment. Amicus contends that one such class is "nuisance speech" and that "indecent" speech which, by means of cable TV access channels, assaults unwilling adults in the privacy of the home and is easily accessible to children, is a form of "nuisance speech"[32] which Congress

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[31] See, e.g., **"Cable runs out of room,"** *N.Y. Post*, 7/17/95 (article notes that there is no space on Time Warner's Manhattan cable system for "Turner Classic Movies" and the "History Channel," in part because Time Warner is required to carry four "public access" channels).

[32] *Cf.*, 50 *Am. Jur. 2d* Lewdness, Indecency pp. 484-485 ("use of indecent language...under certain circumstances...considered a nuisance."); *Am. Jur. Proof of Facts*, Vol. 8, p. 530 (1960): ("[A] nuisance may be established by showing that the thing involved violates the laws of decency; and a showing of hurt to moral sensibilities is deemed sufficiently substantial to justify judicial interposition.").

can constitutionally prohibit.[33]

The concept of "nuisance speech," as a class of speech unprotected by the First Amendment, was first alluded to by this honorable Court in *Chaplinsky v. New Hampshire,*[34] where the Court stated:

> There are certain, well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene...those which by their very utterance inflict injury or tend to incite an immediate breach of the peace...[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[35]

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[33] Amicus does not say that indecency is unprotected in every medium or context. *Cf. Pacifica*, 438 U.S. 726, at 746 ("We may assume, arguendo, that this monologue would be protected in other contexts."). Time of day is one variable to be considered. *Id.* at 750.

[34] 315 U.S. 568 (1942).

[35] *Id.* at 571-572. Amicus says "alluded to" because the above quoted material, while not specifically mentioning nuisance speech, twice cites the book *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941), which does so at pp. 149-150:

> But the law also punishes a few classes of words like obscenity, profanity...because the very utterance of such words is considered to inflict a present injury upon listeners, readers...This is a very different matter from punishing words because they express ideas thought to cause future danger to the state...[P]roperly limited they fall outside the protection of the free speech clauses...[P]rofanity, indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young and the peace of mind of those who hear or see...The man who swears in a street car is as much of a *nuisance* as the man who smokes there. [Emphasis supplied]

In *Breard v. Alexandria*[36] and *Kovacs v. Cooper*[37] this Court upheld nuisance ordinances aimed at means of communication that intrude uninvitedly into the privacy of the home and, in *Hess v. Indiana,*[38] this Court identified speech that amounts to a public nuisance as outside the protection of the First Amendment:

> It hardly needs repeating that '[t]he...guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'...Hess' words could [not] be punished as obscene...By the same token, any suggestion that Hess' speech amounted to 'fighting words'...could not withstand scrutiny... In addition, there is no evidence to indicate that Hess' speech amounted to a public nuisance in that privacy interests were being invaded.[39] [Emphasis added]

The public nuisance rationale was also applied by

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[36] 341 U.S. 622 (1951).

[37] 366 U.S. 77 (1949).

[38] 414 U.S. 105 (1973).

[39] *Id.* at 107-108. *Cf. Redrup v. New York*, 386 U.S. 767, 769 (1967) and *Close v. Lederele*, 424 F.2d 988, 990 (1st Cir. 1970), *cert. den.*, 400 U.S. 903 (1970), both of which recognize a need for government protection against an "assault upon individual privacy."

three Justices writing in dissent in *Rosenfeld v. New Jersey*[40]. Justice Powell, with whom the Chief Justice and Mr. Justice Blackmun joined, wrote:

> But the exception to the First Amendment protection in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience...[A] verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the...subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance...The Model Penal Code...also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within...First Amendment [protection].[41] [Emphasis added]

In *Bethel School District No. 403 v. Fraser*[42], this Court held that a student could be penalized for making an indecent speech before a school assembly, attended by students and faculty, in violation of a school rule. Justice Stevens dissented on due process grounds, but also noted:

> [A] 'nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard...Vulgar language, like vulgar animals, may be acceptable in some contexts, and intolerable in others...It seems...obvious that [the] speech would

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[40] 408 U.S. 901 (1972).

[41] *Id.* at 408 U.S. 905-906.

[42] 478 U.S. 675 (1986).

> be inappropriate in certain...settings."[43]

The concept of "nuisance speech" was also applied to TV in *FCC v. Pacifica Foundation.*[44] In *Pacifica*, this Court, in affirming an FCC ruling that the Carlin monologue, "Filthy Words," as broadcast was indecent and prohibited by 18 U.S.C. 1464, observed that the FCC decision "rested entirely on a nuisance rationale under which context is all important" and compared indecent broadcast to a "pig in a parlor instead of the barnyard."[45] The Pacifica Court also stated that special regulation of broadcast indecency was justified because it "confronts the citizen, not only in public, but also in the privacy of the home" and because it is "uniquely accessible to children."[46]

Amicus contends that *Pacifica* must be read consistent with the line of cases cited above, which treat "nuisance speech" as unprotected. Amicus also contends that indecency on cable TV access channels, which intrudes into the home, assaulting unconsenting adults and providing easy access to children, also amounts to a "nuisance" and is unprotected by the First Amendment.[47]

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[43] *Id.* at 696.

[44] 438 U.S. 726 (1978); see also *Tallman v. United States*, 465 F.2d 282, 285-286 (7th Cir. 1972).

[45] *Id.* at 750.

[46] *Id.* at 748-749. Justice Powell, concurring, specifically agreed that protecting adults was a valid concern. Id. at 759-760

[47] If Amicus' is correct that "nuisance speech" is unprotected, then "strict scrutiny" is not the level of scrutiny to be applied. *Cf., City of Dallas v. Stanglin*, 109 S.Ct. 159, 57 LW 4406, 4407 (1989): "Unless laws 'create suspect classifications or impinge upon constitutionally

B. Cable TV Indecency Is Just As Much a 'Nuisance' As Broadcast Indecency And Can Be Prohibited By Congress

While it is true that cable viewers elect to have cable installed and pay a monthly fee, it is also true that broadcast viewers elect to pay for the TV, have an antenna installed and support the programming by buying the products advertised. It does not follow that either desire or "elect" to have indecent programming dumped into their living rooms or have their children exposed to it.

Amicus would also point out that in over 60 percent of American homes, broadcast programming now enters the home via a cable TV wire as a part of the basic cable package, and cable viewers do not have any more control over the rest of the basic package, which includes public and leased access channels, than they do over the broadcast programming. A "pig" which comes uninvited into the parlor via a cable TV wire is just as offensive to unwilling adults and accessible to children as the same "pig" which enters the home directly "over the airwaves."

If broadcast indecency constitutes a "nuisance," which Congress can prohibit, then indecency on cable TV access channels, to the extent that it invades the privacy of the home and is accessible to children, is also a "nuisance,"[48] which Congress can prohibit. Section 10(b)

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protected rights,'...it need only be shown that they bear 'some rational relationship to a leg itimate state purpose.'"

[48] *Cf.*, op ed article Goodbye, Channel J -- and Good Riddance, *N.Y. Times*, 9/29/90, by Gilbert T. Sewall, describing programming on Manhattan's leased access "Channel J" as "hard-core sex programming" and as being one of New York's "real public nuisances."

is, therefore, a lawful exercise of the legislative power.[49]

C. The Summary Affirmance in Wilkinson v. Jones *Does Not Prevent This Court from Upholding The Regulation of Indecency at Issue Here.*

In *Wilkinson v. Jones,*[50] this Court, over the objection of the Chief Justice and Justice O'Connor, summarily affirmed a decision of the Tenth Circuit which, in a per curiam opinion,[51] had affirmed a decision of the district court of Utah[52] invalidating a Utah cable TV indecency act. The Court of Appeals' affirmance was based on "the reasons stated" by the district court, which had held that the Utah Act was preempted by Federal law and was "unconstitutionally overbroad and vague, and void on its face."[53] Circuit Judge Baldock, who agreed the law was overbroad and vague, nevertheless concluded in a concurring opinion "that the *Pacifica* rationale for the regulation of indecency applies to cablecasting."[54]

While a summary affirmance is a ruling "on the

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[49] *Cf., Kovacs*, 336 U.S. 77, at 85 ("We need not determine whether this ordinance...is regulatory or prohibitory. All regulatory enactments are prohibitory so far as their restrictions are concerned.").

[50] 480 U.S. 926 (1987).

[51] *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986).

[52] *Community Television of Utah, Inc. v. Wilkinson*, 611 F.Supp. 1099 (D.Utah 1985).

[53] 611 F.Supp at 1105, 1117.

[54] *Jones v. Wilkinson*, 800 F.2d 989, at 1006.

merits"[55] and does prevent lower courts from "coming to opposite conclusions on the precise issues presented and necessarily decided" by the action,[56] it does not have the same precedential value as does an opinion of the Supreme Court "after briefing and oral argument on the merits"[57] and should not be read as necessarily adopting the reasoning of the lower court whose judgement is appealed[58] or understood "as breaking new ground, but as applying principles established by prior decisions *to the particular facts involved.*"[59]

How then should this Court's summary affirmance of the Tenth Circuit's per curiam opinion in *Wilkinson v. Jones, supra* be understood? While dicta or overbroad language in the district court's opinion has prompted assertions that it rests on a determination that the First Amendment prevents government prohibitions on all nonobscene cable programming, the district court decision could rest on several grounds and should not be read as establishing the broadest constitutional principle.[60]

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[55] *Hicks v. Miranda,* 422 U.S. 332, 344 (1975).

[56] *Mandel v. Bradley,* 432 U.S. 173, 176 (1977).

[57] *Edelman v. Jordan,* 415 U.S. 651, 657 (1974); *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 476, n.20 (1979).

[58] *Mandel v. Bradley,* 432 U.S. at 176.

[59] *Id.* at 176.

[60] In *Wilkinson v. Jones,* the first question presented by Appellant's Jurisdictional Statement [*cf.* 55 L.W. 3577] was the following: "(1) Does First Amendment deny government any power to restrict public dissemination of indecent material on cable television in any circumstances?" In their Motion To Affirm [at p. 20], however, the

By summarily affirming, this honorable Court provided no indication of the rationale of the Court in affirming or of the Justices that voted to affirm. Some or all of the justices could have concluded that the Utah statute as such was preempted or was vague or overbroad (and therefore curable), without actually deciding Appellant's broad constitutional issue as phrased in question (1) above.

The "precedential significance" of a summary decision must be assessed in light of all the facts in that decision and that where the facts of a subsequent case are "very different," lower courts must make an "independent examination of the merits" in the new case.[61] Clearly then, the summary affirmance in *Wilkinson* does not foreclose the Court itself from addressing here the validity of very different federal Cable TV indecency legislation.

III
APPLYING THE INDECENCY STANDARD TO CABLE TV ACCESS CHANNELS WILL NOT REDUCE ADULTS TO VIEWING ONLY WHAT IS FIT FOR CHILDREN.

Petitioners AAP argue that Section 10 would reduce adults to viewing only that which is fit for children.[62] While protecting children may have been Congress' primary concern, however, Amicus would contend that it wasn't

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Appellees argued that: "Appellant not only asks the Court to abstract from this case the broadest constitutional issue raised...but to disregard the other necessarily attendant issues that make clear that this statute is infirm on narrower constitutional grounds."

[61] *Mandel v. Bradley,* 432 U.S. at 177.

[62] Pet. AAP Br. at 37.

the only concern. In introducing his amendment,[63] Senator Helms said: "consumers have the right to reject such programming from being fed into their homes" [emphasis added] and then quoted from a mother's letter:

> Words cannot describe the outrage I felt when I found myself watching on cable TV a couple engaging in oral sex...I feel as though my daughter and I are subject to verbal and visual violation just by...pushing the wrong button.[64] [Emph. added]

In introducing his amendment to restore to cable operators editorial control over "sexually explicit conduct," obscenity and solicitation for prostitution on *public* access channels, Senator Fowler did not mention children.[65]

Amicus would argue that the "indecency" concept is linked to what offends societal standards of propriety and

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[63] Section 10(a)(b). In 1988, when Senator Helms introduced an amendment to prohibit indecent broadcast, he clearly intended it to protect not just children but all Americans. See, Cong. Rec. S.9911-9913 (daily ed. July 26, 1988). In 1991, however, a panel of the D.C. Circuit invalidated that amendment and, in the process, indicated that the only valid governmental interest was protection of children. *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991).

[64] 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992). In support of the Helms amendment, Senator Thurmond also stated at S648:

> [T]his pornography is entering the privacy of another's home completely unsolicited. Furthermore, children cannot be monitored every minute of the day. [Emphasis added]

[65] 138 Cong. Rec. S649 (daily rec. Jan. 30, 1992) (statement of Sen. Fowler). Senator Wirth, who authored the provisions of the Cable Act of 1984 pertaining to public access channels, also did not mention children in his statement of support for the Fowler amendment. 138 Cong. Rec. S.650 (daily rec. Jan. 30, 1992) (statement of Sen. Wirth).

morality and is determined by community standards--not solely by what is deemed "harmful to minors."[66] In *Roth v. United States*,[67] this honorable Court stated:

> "This Court, as early as 1896, said of the Federal Obscenity statute: '...Every one who uses the mails...must take notice of what...is meant by decency...in social life.'" [Emphasis added]

In *Manual Enterprises, Inc. v. Day*,[68] Justice Harlan stated that indecency (viz. "patent offensiveness") involves application of community standards:

> "The words...'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community mores...[T]he statute reaches only indecent material...."

In *FCC v. Pacifica Foundation*, this honorable Court stated that the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[69] In *Bethel School District No. 403 v. Fraser*,[70] this Court noted that members of Congress were prohibited from using "indecent language against the proceedings of the House," and also stated:

> "[S]chools must teach by example the shared values of a civilized social order....The pervasive sexual

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[66] See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

[67] 354 U.S. 476, at 491, n.28 (1957).

[68] 370 U.S. 478, at 482 (1962).

[69] 438 U.S. 726, at 740.

[70] 478 U.S. 675, at 682 (1986).

innuendo in [the student's] speech was plainly offensive to...teachers and students--indeed to any mature person."[71] [Emphasis added]

In *Barnes v. Glen Theatre,*[72] this honorable Court upheld an Indiana statute prohibiting "Public Indecency." In so doing, Chief Justice Rehnquist noted:

"Public indecency statutes of this sort...reflect the moral disapproval of people appearing in the nude among strangers in pubic places....Thus the public indecency statute furthers a substantial government interest in protecting order and morality."[73]

Nor has this honorable Court said that Congress may only regulate indecency to protect children. Mr. Justice Stevens, who delivered the opinion of the Court, with respect to Part IV-C, in *Pacifica*, described one attribute of the broadcast media which justifies restricting indecency:

"[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen...in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder...[P]rior warnings cannot completely protect the listener or viewer from unexpected program content."[74] [Emphasis added]

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[71] *Id.* at 683.

[72] 501 U.S. 560 (1991).

[73] *Id.* at 568-569.

[74] 438 U.S. 726, at 748-749.

In *Frisby v. Schultz,*[75] this Court described the "interest" in protecting the well-being, tranquility, and privacy of the home as being "certainly of the highest order in a free and civilized society." The Court then stated:

"One important aspect of residential privacy is protection of the unwilling listener. Although in many locations we expect individuals simply to avoid speech..., the home is different....Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that government may protect this freedom. See, e.g., *FCC v. Pacifica*, 438 U.S. 726, 748-749 (1978)...; id., at 759-760 (Powell, J. concurring in part and concurring in judgement)."[76]

In *Sable Communications of California, Inc. v. FCC,*[77] the sole issue, as framed by the parties, was whether a ban on indecent dial-a-porn messages could be justified solely on a protection of minors rationale. This Court said "No," but noted:

The private...telephone communications at issue here are substantially different from the public radio broadcasting at issue in *Pacifica*....Callers will generally not be unwilling listeners. The context of dial-in services...is manifestly different from a situation in which a listener does not want the received message. Placing a phone call is not the

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[75] 487 U.S. 474, at 484 (1988).

[76] *Id.* at 484-485. See also, *People v. Starview Drive-In Theatre,* 427 N.E.2d 201 (Ill. App. Ct. 1981), *appeal dism'd sub nom., Starview Drive-In Theatre, Inc. v. Cook Co.,* 457 U.S. 113 (1982).

[77] 492 U.S. 115 (1989).

same as turning on a radio and being taken by surprise...[78] [Emphasis added]

Amicus, therefore, urges this Court to "include in the balance" not just children but also the many adults[79] who do want to be assaulted in the privacy of their homes by indecent programming on cable TV access channels.

IV
THE 'INDECENCY' STANDARD IS NEITHER VAGUE NOR OVERBROAD

Petitioners AAP also argue that the definition of "indecent" is vague.[80] In *Pacifica*, however, this Court, rejected a very similar challenge:

> [Pacifica] argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required...At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern...The danger dismissed so summarily in *Red Lion*...was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political

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[78] Id. at 127-128.

[79] *Cf.*, opinion polls cited in Peters, 'Information Superhighway or Technological Sewer: What Will It Be?, 47 *Fed. Com. L.J.*, Vol. 2, 333, at 334, footnotes 2-7 (December 1994).

[80] Pet. AAP Br. at 43-47.

> controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort."[81]

In *Miller v. California,*[82] this Court also pointed to the "patently offensive sexual conduct" prong of its obscenity test (which is very similar to the FCC's "indecency" definition) as providing "fair notice" to those who traffic in sex materials.[83] Even before *Miller*, Justice Harlan equated "indecency" with "patent offensiveness:"

> These...cannot be deemed so offensive as to affront current community standards of decency -- a quality that we shall hereafter refer to as "patent offensiveness" or "indecency."[84]

Petitioners AAP argue, however, that while "patently offensive" is included in the obscenity definition, this Court has "limited the risk of arbitrary enforcement by adding other safeguards."[85] This, however, only restates the obvious--i.e., that "obscenity" defines a narrow category of speech which is outside First Amendment

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[81] *Id.* at 742-743.

[82] 413 U.S. 15 (1973).

[83] *Id.* at 27-28.

[84] *Manual Enterprises, Inc. v. Day*, 370 U.S. at 482.

[85] Pet. AAP Br. at 44.

protection, irrespective of context or medium,[86] while "indecency" defines a broader category. It has little to do with whether the second prong of *Miller* is vague.

Amicus notes further that what is "patently offensive" is determined by applying community standards.[87] Under the nuisance rationale, "time of day"[88] and "serious value,"[89] are also variables to be considered in determining *whether* programming is "indecent." The programs Petitioners AAP desire to protect, therefore, might not be "indecent" at all or if shown in the late evening or after midnight.[90]

There is also an extensive history of court decisions and FCC rulings to guide program providers in determining what is "patently offensive" or "indecent," and Amicus would contend that the real problem is not an inability to determine what is "indecent," but rather a failure to

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[86] See, e.g., *Kaplan v. California*, 413 U.S. 115, at 118-119 (1973).

[87] At page 9 of their brief, Petitioners AAP say that a program which provides valuable information may also be "controversial or offensive to some viewers." [Emphasis supplied] Programming is not "indecent," however, simply because it is "offensive to some viewers."

[88] *FCC v. Pacifica Foundation*, 438 U.S. 726, at 750.

[89] Cf., *Pacifica*, 438 U.S. 726, at 732, n.6; *Action for Children's TV v. FCC*, 852 F.2d 1332, at 1339-1340 (D.C. Cir. 1988).

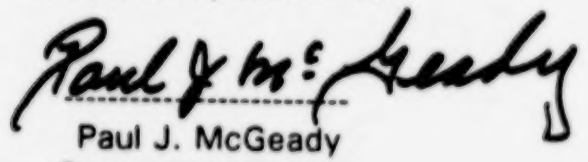
[90] *Amicus also contends, however, that some descriptions or depictions of sexual or excretory activities or organs on cable TV access channels are so offensive as to be "indecent" at ANY TIME OF DAY OR NIGHT and must be on a restricted access channel.*

recognize that there are "rights and interests, 'other than those of the advocates involved,'"[91] -- which include the "right of the Nation...to maintain a decent society."[92]

CONCLUSION

For all of the above the decision of the District of Columbia Circuit should be affirmed.

Respectfully submitted



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[91] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, at 58 (1973) [quoting from *Breard v. Alexandria*, 341 U.S. 622, 642 (1951)].

[92] 413 U.S. at 59-60 [quoting from *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Mr. Chief Justice Warren, dissenting)]